IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GITHINJI, KARANJA & KANTAI, JJ.A)

CRIMINAL APPEAL NO. 512 OF 2010

BETWEEN

CHARLES NJONJO GITURO..............................APPELLANT

AND

REPUBLIC...RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya

at Nairobi (Lesiit, J) dated 22nd *July, 2010*

in

H.C.CR.C NO. 69 of 2009)

****

JUDGMENT OF THE COURT

1. This is an appeal by **Charles Njonjo Gituro (appellant)** against conviction and death sentence imposed by the High Court (**Lesiit, J.**) on 22nd July, 2010. The case involved a husband and wife who got engaged in what they may have thought was an ordinary domestic quarrel but which unfortunately left the wife dead, the husband sentenced to death and a seven (7) year old child left bereft of parental care and protection.

2. The facts leading to the said incident as narrated by the witnesses who testified before the High Court were as follows: **Mercy Nyambura Mburu (PW1) (Mercy)** was a neighbour to the deceased **(Regina Nyambura Njonjo)** at a place called Ngorongo in Gatundu North. On 5th April, 2009 at about 10.00 p.m she was asleep in her house with her three children. She heard a knock on her door and when she opened, she found the deceased standing there stark naked. She also had some burns on her body. Upon enquiry, the deceased told Mercy that it was her husband who had burnt her. She welcomed her in but shortly thereafter, the appellant and his brother also appeared. Using derogatory language, the appellant ordered the deceased to leave Mercy's house but when Mercy said she did not want any quarrels in her house, the appellant and his brother left in a huff leaving the injured wife behind.

3. Mercy who had already wrapped a lesso around the deceased accompanied her to Kajeria Police Post where they reported the incident. The two however, found that the appellant and his brother had gotten to the police post ahead of them, and reported that the deceased had attempted to kill herself. On seeing the injuries on the deceased, the police officer on duty gave her a note to attend treatment. Mercy took her to the nearby dispensary where she was given first aid and referred to Thika District Hospital for further treatment. From there they were referred to Kenyatta National Hospital where the deceased was admitted. She had suffered 54% burns.

4. Mercy was emphatic that the deceased had informed her that it was the appellant who had burnt her. She also stated that the appellant had told the deceased in her presence not to go back to their house. It was Mercy's further evidence that the deceased called her mother using Mercy's phone and informed her that the appellant had burnt her.

5. The deceased's mother, Regina (PW4) narrated to the trial court how she received the news of her daughter's injuries. She told the court that the deceased had informed her that she had been burnt by the appellant because of reporting a domestic dispute to the Chief. The **Assistant Chief (PW2)** confirmed that the deceased had made such a report a day before he learnt of her burning. Regina continued to visit her daughter in hospital until 26th April, 2009 when the deceased succumbed to her injuries. She identified her daughter's body to Dr. Njeru for postmodern purposes. According to the doctor, the cause of death was burns which were 54%. He completed the post mortem form and

produced it before the court as exhibit.

6. PW8 No. 49628 CPL Francis Kipsang was the investigating officer in the matter. He narrated to the court how the appellant went to the police post and reported that his wife had burnt herself. Asked why he had left her without taking her to hospital, the appellant is said to have responded that when he followed her to his neighbour's house where his wife had ran to, he was chased away and that is why he decided to go and report the matter at the police post. According to the witness it was while he was recording the appellant's statement that the deceased arrived at the police post in the company of some neighbours. He said that the deceased went straight to the appellant and asked him what he was doing at the police post after burning her. CPL Kipsang told the court that he went to the appellant's house but did not recover any exhibits. He visited the deceased at the hospital one week after the incident. He said that the deceased's condition was not bad and she was able to talk to him. She narrated to him that it was the appellant who had kicked a lit tin lamp towards her as she lay on their bed. The witness then recorded the deceased's statement which was produced before the trial court as exhibit.

7. The three and half (3½) pages statement gave a detailed account of the events leading to the incident in question. The deceased explained in the statement that the day was just an ordinary one and she had even cooked supper for her husband that evening. When he came home however, he had refused to eat and picked a quarrel with her for reporting some problems they had to the chief. He is said to have slapped her severally but she went to the bedroom and lay on top of the bed without covering herself. The appellant is said to have followed her a few moments later and kicked the tin lamp which was on top of the box near the bed and it fell on her setting her ablaze. That is when she jumped off the bed and ran to her neighbour's house screaming for help. In the said statement, she was categorical; that it was the appellant who had kicked the tin lamp that set her aflame as she lay on the bed. This is the statement heavily relied on by the trial court to convict the appellant. We shall revert to that issue later.

8. In his defence, the appellant narrated his version of what happened on the material date. He corroborated Regina's statement from the beginning upto the point she retired to go to bed. He conceded that they had visited deceased's mother earlier that day and they left together. He also conceded that the deceased had informed him that she had reported him to the chief for having a love affair with one mama Njonjo and that he was likely to be summoned to appear before the chief in the near future. That appears to have been the cause of their disagreement. He nonetheless said that it was the deceased who put out the hurricane lamp, poured paraffin on herself and struck a match stick setting herself ablaze. He said that he then covered her with a blanket in a bid to put off the fire. He said that the deceased had then just sneaked out of the house and went to the neighbour's house. He had gone to look for her and he found her in Mercy's house but she chased him away. He therefore went to the police post to report the incident and that is when the deceased and Mercy found him there. The rest is on record. He therefore denied setting fire on his late wife.

9. The learned Judge considered all this evidence and the applicable law particularly the law pertaining to statements given by a deceased person as to the cause of his/her death. The learned Judge expressed herself as follows:-

> **"…From the totality of his conduct that night, I find that the accused deliberately hit the lamp knowing full well it could cause serious burns on the deceased.**

The fact the accused was not keen to help the deceased thereafter is proof he was satisfied with the results of his actions."

The learned Judge in the end found both *mens rea* and *actus reus* proved. She rejected the defence proffered by the appellant, convicted him and sentenced him to death. It is that conviction and sentence that the appellant has challenged in this Court through the supplementary memorandum of appeal filed on 6th September, 2018 filed by the firm of Celin Odembo Advocate in which ten (10) grounds of appeal are raised. He also relied on a list of authorities filed on 26th November, 2018.

10. At the plenary hearing of the appeal, learned counsel Mr. Karuku Wachira appeared for the appellant while Mr. Omirera appeared for the state. Mr. Karuku condensed the grounds of appeal into three as follows:- lack of evidence; lack of *mens rea* and the sentence. On the issue of paucity of evidence, learned counsel was of the view that the evidence on record could not support a conviction. He submitted that it was not clear what had caused the fire; that the murder weapon had not been recovered; that the death declaration relied on by the court did not meet the threshold required for death declarations to be relied upon.

11. Expounding on the issue of the death declarations, counsel maintained that the deceased was not contemplating imminent death when she made the statement as she died several days after recording the statement and the statement did not therefore qualify to be treated as a death declaration. Furthermore, intent to kill had not been established and the fact that the appellant was arrested three (3) months after the death of the deceased demonstrated that the investigating officer was not sure that the appellant had committed the offence. Although not raised as a ground of appeal, learned counsel urged the court to reconsider the sentence in line with the Supreme Court's decision in **Francis Muruatetu & others vs. Republic (2017) eKLR.**

12. On his part, **Mr. Omirera** opposed the appeal. He discounted the appellant's theory that the deceased had committed suicide and maintained that the evidence on record sufficed to support the conviction. Counsel urged that the death declaration had been made to three different people and it was therefore consistent and corroborative. He differed with appellant's counsel's submission that the deceased did not contemplate imminent death as at the time she made the statement, saying that on the contrary, the deceased was under imminent danger of death. On the issue of *mens rea*, counsel urged that by kicking the lamp onto the deceased, it was evident the appellant meant to either cause death or grievous injuries to the deceased, and this amounted to *mens rea*. The fact that the appellant did not take the deceased to hospital and also addressed her in a most derogatory manner after the burning was also telling. Mr. Omirera urged the court to dismiss the appeal.

13. We have carefully re-considered the evidence on record as we are enjoined to do on a first appeal. (See **Okeno vs Republic**1972 E.A 32. As re-analysed above along with the grounds of appeal urged before us, rival submissions by counsel and the law we discern three issues for determination in this appeal as follows:-

1. whether it was the appellant who burnt the deceased or did the deceased try to commit suicide;

2. If we find the appellant responsible for the burns on the deceased, did he have the necessary *mens rea*?

3. Was the deceased's statement properly admitted in evidence and what was it's probative value?

Ultimately, what offence if any, was proved by the sum total of the evidence on record.

14. On the first issue, two theories were advanced to explain how the unfortunate incident happened. One theory was advanced by the appellant and the other by the deceased. None of the theories was witnessed by an independent witness. The deceased's theory, which the trial court believed, was supported by the deceased's statement and the evidence of her neighbour and her mother who she told that it was the appellant who had burnt her. The first person the deceased sought help from after her encounter with the fire was Mercy (PW1) who was a family friend. Mercy's evidence was that the deceased was stark naked and had gone to her for help. Mercy performed first aid on her and covered her body. The deceased told Mercy that it was the appellant who had burnt her because she had reported their problems to the chief.

15. Before long the deceased and his brother followed the deceased. He was not following her to take her to hospital or to empathise with her and offer her a comforting shoulder to lean on. Instead, he called her a 'dog' and tried to force her out of Mercy's house. Instead of pleading with her and making arrangements to take her to hospital, he rushed to the police post to report a suicide attempt. One wonders, why did he have to report the suicide attempt if it was not to steal a match on the deceased?

16. The other point that is not adding up is, if the incident happened as narrated by the appellant, after wrapping the deceased with the blanket (which was never recovered), why did she have to run away to seek help from an outsider; why did he follow her with such fury and venom and spew all manner of expletives against her? The appellant's conduct, in our view was not that of the husband of a woman who had attempted to take away her life, but that of somebody who was upset with his wife and wanted to punish her for reporting their domestic issues to the chief. When he followed her to Mercy's house, he must have realised the enormity of what he had done and decided to go to the police post before the deceased got there. From the above analysis, it is clear to us that the appellant's theory defies logic and is not supported by any evidence, circumstantial or otherwise.

17. Our first issue for determination is therefore resolved in favour of the deceased. We are satisfied that the appellant is the one who kicked the tin lamp from the table onto the appellant setting her aflame and therefore causing her the injuries that were eventually responsible for her death. *Actus reus* has therefore been proved. We shall defer the issue of *mens rea* and revert to it after addressing the issue relating to the death declaration.

18. Death declarations are provided for under **section 33** of the **Evidence Act Cap 80 Laws of Kenya** which provides in relevant part as follows: -

> **"33. Statements, written or oral, of admissible facts made by a person who is dead, …… are themselves *admissible in the following cases –***
>
> **a. when the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question and such statements are admissible <u>whether the person who made them was or was not, at the time when they were made, under expectation of death,</u> and whatever may be the nature of the proceeding in which the cause of his death comes into question;"**
>
> (Emphasis supplied)

We have added the emphasis because there is tendency by counsel, as is the case here, to ignore the emphasised words above in favour of the standard applied in England as set out in the case of **<u>R v Woodcock</u> [1789] 1 Leach 500** at page 504 and was approved in **<u>R v Perry</u> [1909] 2 KB 687** at Pg. 701 stating:

> **"The general principle on which this species of evidence is admitted is that they are declarations made in extremity, when the party is at the point of death, and when every hope of this world is gone, when every motive to falsehood is silenced, and the mind induced by the most powerful considerations to speak the truth; a situation so solemn and so awful is considered by the law as creating an obligation equal to that which is imposed by a positive oath administered in a court of justice."**

Under English law the following ingredients must be present before a statement by a deceased person can qualify to be admissible as a death declaration; the declarant must be in:

- actual danger of death when the declaration was made,
- have had a full apprehension of his danger,
- death must have ensued

19. The situation in Kenya is, however, different as exemplified in **section 33** of the **Evidence Act** (supra). There is a catena of authorities from this Court on the nature and the manner of receiving and considering evidence of dying declaration. We take it from **<u>Choge v Republic</u> [1985] KLR 1**, citing the predecessor of this Court in **<u>Pius Jasanga s/o Akumu</u>**

V. **R (1954) 21 EACA 331**:

> **"In Kenya the admissibility of a dying declaration does not depend, as it does in England, upon the declarant having at the time, a settled, hopeless expectation of imminent death, so that the awful solemnity of his situation may be considered as creating an obligation equivalent to that imposed by the taking of an oath.**
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> **In Kenya (as in India) the admissibility of statements by persons who have died as to the cause of death depends merely upon section 32 of the Indian Evidence Act. It has been said by this court that the weight to be attached to dying declarations in this country must, consequently, be less than that attached to them in England, and that the exercise of caution in the reception of such statements is even more necessary in this country than in England. (R v Muyovya bin Msuma (1939) 6 EACA 128. See also R v Premanda (1925) 52 Cal 987.)**
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> **The question of the caution to be exercised in the reception of dying declarations and the necessity for their corroboration has been considered by this court in numerous cases, and a passage from the 7th Edition of Field on Evidence has repeatedly been cited with approval:**
>
> **The caution with which this kind of testimony should be received has often been commented upon. The test of cross examination may be wholly wanting, and… the particulars of the violence may have occurred under circumstances of confusion and surprise calculated to prevent their being accurately observed…The deceased may have stated inferences from facts concerning which he may have omitted important particulars, from not having his attention called to them. (Ramazani bin Mirandu (1934) 1 EACA 107; R v Okulu s/o Eloku (1938) 5 EACA 39; R v Muyovya bin Msuma (supra). The fact that the deceased told different persons that the appellant was the assailant is evidence of the consistency of his belief that such was the case: it is not guarantee for accuracy (ibid).**
>
> **It is not a rule of law that, in order to support a conviction there must be corroboration of a dying declaration (R v Eligu s/o Odel and another (1943) 10 EACA 9; Re Guruswani [1940] Mad 158, and there may be circumstances which go to show that the deceased could not have been mistaken in his identification of the accused. See for instance the case of the second accused in R v Eligu s/o Odel and Epongu s/o Ewunyu (1943) 10 EACA 90). But it is, generally speaking, very unsafe to base a conviction solely on the dying declaration of a deceased person, made in the absence of the accused and not subject of cross-examination, unless there is satisfactory corroboration. (R v Said Abdulla (1945) 12 EACA 67; R v Mgundulwa s/o Jalo (1946) 13 EACA 169, 171)."**

*See also **R v Eligu s/o Odel (1943) 10 EACA 90**, **Okethi Okalo v Republic [1965] EA 555**, **Aluta v Republic [1985] KLR 543**, and **Kihara v Republic [1986] KLR 473**.*

20. The law in this area is clearly articulated in the case of **Nelson Julius Karanja Irungu vs. Republic [2010] eKLR** which was cited to us by learned counsel for the appellant. It is clear however that this case does not support counsel's contention that the deceased's statement does not qualify as a death declaration because she was not under contemplation of imminent death. We do not therefore need to discuss the details as to whether the deceased was in imminent danger of death when she made the statement in question. The statement is clearly admissible in evidence. We also note that the statement was consistent with the statements made by the deceased to Mercy and her mother (PW5) to the effect that it was the appellant who had burnt her. We find corroboration to the death declaration from those statements.

21. There were some minor discrepancies in the recorded statement pointed out to us by learned counsel for the appellant as to whether it was a tin lamp or a *'cantille'* which was the source of the fire. As observed by the trial court, this appeared to be a grammar challenge on the part of the investigating officer. In our view this was a small issue as nobody seems to know what a *'cantille'* was. We also note that the appellant himself, while advancing the suicide theory referred to a tin lamp which was lighting the room. We are satisfied that the death declaration was properly admitted and the same was also corroborated by the evidence of PW1 and PW5 and its probative value was very strong.

22. This brings us to the next issue as to whether the killing was with malice aforethought *(mens rea)*. Malice aforethought is defined in **Section 206** of the **Penal Code** as an intention to cause death of or to do grievous harm, to any person. It also includes possession of knowledge that the act causing death will probably cause the death of or grievous bodily harm to that person. Malice aforethought, which is a very important ingredient in a charge of murder, was succinctly discussed in the decision of this Court in the case of **Nzuki v R [1993] KLR 171** at page 175 para 34 as follows:-

> "**Before an act can be murder, it must be aimed at** ***someone and in addition, it must be an act committed with one of the following intentions, the test of which is always subjective to the actual accused:***
>
> > **i. The intention to cause death;**
> >
> > **ii. The intention to cause grievous bodily harm;**
> >
> > **iii. Where the accused knows that there is a serious risk that death or grievous bodily harm will ensue from his acts, and commits these acts deliberately and without lawful excuse with the intention to expose a potential victim to that risk as the result of those acts.**
>
> **It does not matter in such circumstances whether the accused desires those consequences to ensue or not and in none of these cases does it matter that the act and the intention were aimed at a potential victim other than the one who succumbed."**

23. In this case, we must ask ourselves whether there was sufficient evidence on record to establish that the appellant intended to cause the death of the deceased, or cause her grievous bodily harm. For instance, in the case of **Bonaya Tutut Ipu & Another v R, Criminal Appeal Nos. 43 & 50 of 2014 [2015] eKLR** this Court cited with approval the persuasive authority of the Ugandan Court of Appeal case of **Chesakit v UG, Criminal Appeal 95 of 2004** where that Court held:-

> "**In determining a charge of murder whether malice aforethought has been proved, the court must take into account factors such as the part of the body injured, the type of weapon used if any, the type of injuries inflicted upon the deceased and the subsequent conduct of the accused person."**

The court also drew inspiration from a decision of the predecessor of this Court in **Rex vs Tuper S/O Ocher [1945] 12 EACA 63** wherein, it was held:

> **"It (the court) has a duty to perform in considering the weapon used and the part of the body injured, in arriving at a conclusion as to whether malice aforethought has been established, and it will be obvious that ordinarily an inference of malice will flow more readily from the case, say of a spear or knife than from the use of a stick..."**

From the circumstances of the case before us, are we able to draw a conclusion that the appellant had the intent to kill the deceased or cause her grievous bodily harm? Our finding on how the burns that eventually caused the death of the deceased was that it was the appellant who kicked a lit tin lamp towards the bed where the appellant lay uncovered. Could he reasonably be said to have foreseen the harm this act would cause to the appellant?

24. To start with, the fact that fire is dangerous cannot be over emphasised. Every human being right from his/her nascent days is warned against playing with fire. The appellant clearly knew that it was dangerous to throw an uncovered lamp to another human being particularly when such person was lying down. He must have anticipated that the lamp was likely to spread the fire and this would certainly cause harm to the deceased. The only doubt in our minds is whether the appellant anticipated the extent of the damage his singular act would cause. In **Nzuki vs Republic** (supra), the Court expressed as follows:-

> "***...The m*ere fact that the accused's conduct is done in the knowledge that grievous harm is likely or highly likely to ensue from his conduct is not by itself enough to convert a homicide into a crime of murder.(see Hyman – v - Director of Public Prosecutions, [1975] AC 55."**

In inferring malice aforethought, the Court has to consider all the circumstances surrounding the matter. In this case the positioning of the tin lamp was not very clear. Was there possibility that the lamp could have fallen on the floor before reaching the bed where the appellant was lying? We are inclined to give benefit of doubt to the appellant and find that there is a likelihood that he could not anticipate the extent of harm his action would visit on his late wife.

25. After a careful consideration of the evidence before us in entirety as analysed above, our finding is that the appellant was responsible for the death of the deceased. *Actus reus* was therefore proved. However, *mens rea* was not proved. Accordingly, we find the charge of murder not proved to the required standard. Instead, the evidence discloses the lesser cognate offence of manslaughter. Accordingly, we set aside conviction for the offence of murder and the death sentence imposed by the trial court and substitute therefor a conviction for the offence of manslaughter contrary to section 202 as read with section 205 of the Penal Code. Having considered the circumstances surrounding the matter we are persuaded that a sentence of 20 years imprisonment from the date of conviction is mete and just, and we impose the same.

Delivered and dated at Nairobi this 22nd day of March, 2019.

E. M. GITHINJI

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR